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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FAIR DRAIN TAXATION, INC.,
a non-profit Michigan Corporation, et al.,
Appellants,

— vs. —

CITY OF ST. CLAIR SHORES,
a Michigan Municipal Corporation, et al.,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan,
Southern Division.

MOTION TO AFFIRM

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On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the Judgment Dismissing Complaint and Amended Complaint for failure to state a claim upon which relief can be granted entered by a three judge district court on July 9, 1962. (App. A22) The entry of this judgment followed the hearing by, and decision of, the district court on a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (App. A-1) filed by or adopted by all of the defendants in the district court, here the appellees. This Motion to Dismiss related to the allegations in the Complaint filed in the district court on behalf of some of the plaintiffs therein, now some of the appellants, on June 19, 1963, and to the allegations in the Amended Complaint (J.S. 19-48) filed on July 8, 1963, on behalf of all of the plaintiffs, now all of the appellants. It was conceded on behalf of the appellants at the hearing on the Motion to Dismiss that the Amended Complaint did not present any new substantial matters not already included in the original Complaint. (J.S. 55).

On June 19, 1963, when the Complaint was filed, the district court issued, at the request of the then plaintiffs, an order to show cause why a temporary injunction should not be entered against the defendants. This show cause order was heard by the three judge district court on June 25, 1963, and the issuance of a temporary injunction was denied. (J.S. 55; App. A23) On June 25, 1963, the district court set July 9, 1963, for consideration of the merits of the Complaint filed by the then plaintiffs, the plaintiffs being unwilling and unprepared to discuss the merits at the show cause order return date. (J.S. 55; App. A24).

The allegations in the Complaint and the Amended Complaint center around the validity and propriety of actions

taken or to be taken by the various defendants, which are alleged to be so taken on the authority of Chapter 20 of the Drain Code of 1956, as amended, of the State of Michigan. Said Chapter 20 is comprised of sections 461 thru 490 of Act No. 40 of the Michigan Public Acts of 1956, as amended. It is officially compiled as Compiled Laws 1948, 1956 Supp. §280.461 thru §280.490 and may be found in Mich. Stats. Ann. at §11.1461 thru §11.1490.

The reference to this statute in the Jurisdictional Statement on page 3 and the verbatim text thereof set forth beginning on page 63 are not complete and up to date. Following the enactment of Chapter 20 as part of Act No. 40 of the Michigan Public Acts of 1956, various parts of said Chapter were amended in 1957, 1959, 1961 and 1963. The amendments in 1963, which became effective on May 17, 1963, involved ten sections of said Chapter 20. None of these amendments, however, are material to the matters and issues considered by the district court on the basis of the allegations in the Complaint and Amended Complaint.

Said Chapter 20 of the Drain Code of 1956, as amended, of the State of Michigan is a re-enactment of the provisions added in 1953 to former drain legislation which originated in 1923 in the State of Michigan. The 1923 drain legislation in turn finds its antecedents going back to 1839 in the State of Michigan. (Rev. Stats. 1846, Chapt. 131.)

ARGUMENT

The district court characterized the action instituted by the plaintiffs, here appellants, as "vexatious in nature" (J.S. 56) and characterized the complaint and amended complaint, consisting of 52 paragraphs and 10 prayers, as a "shotgun amended complaint". (J.S. 61) The same defects apply to the recitation of the "Questions Presented" in the Jurisdictional Statement. (J.S. 3-6). Although the appellants list twelve questions presented by their appeal, there is in reality only one question presented. This single question is whether or not the Legislature of the State of Michigan acted wisely in enacting drain legislation for the state and, in particular, in enacting Chapter 20 of the Drain Code of 1956, as amended. This is not a question of judicial cognizance—not a subject of judicial review. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112; *Green* v. *Frazier*, 253 U.S. 233; *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

The appellants are in reality only saying that they do not like the method the legislature in Michigan chose, in Chapter 20 of the Drain Code of 1956, as amended, to construct and finance drains needed for the public health by one or more public corporations. They are saying that the legislature gave the public corporations too much power. Counsel for the plaintiffs stated to the district court that he could devise better legislation for this purpose than is found in Chapter 20.

One of the most frequently quoted judicial answers to this assertion of the appellants comes from an early Michigan case, In *Sheley* v. *City of Detroit*, 45 Mich. 431, Mr. Justice Cooley said:

> "The questions, then, are questions of legislative power. Whether this method of apportioning the cost of pavement or of repavement is equitable or just or politic, is in no way involved in this suit, and we should depart from our legitimate province if we were to volunteer an opinion upon it. The legislature, acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and of equity. If the legislature declares the cost shall be collected by general levy, or on the other hand shall be levied upon abutting lots or their owners according to values, or to assessed benefits or to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority. We must then address our attention to that point, and to that exclusively."

See also *Bowles* v. *Willingham*, 321 U.S. 503; *Chicago, B. & Q. Ry. Co.* v. *McGuire*, 219 U.S. 549; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398.

In an attempt to show a want of legislative authority and in an attempt to avoid the recognized unwillingness of the courts to review questions of legislative wisdom, the appellants alleged to the district court, and now describe as questions presented on this appeal, a number of generalized and spurious claims of constitutional violations. There were no disputed material facts presented to the district court because the Complaint and Amended Complaint allege no facts beyond the identity of the parties. These complaints contain only a series of allegations in the form of legal conclusions and legal assertions to the effect that there are constitutional defects in the statutes of the State of Michigan. (J.S. 19-52; 7-12)

The district court recognized at once the appropriateness of a motion to dismiss in this situation where no facts were

in dispute (J.S. 12 and 55) and the court was ready to consider the merits of the complaint at the time of the show cause hearing with respect to a temporary injunction (J.S. 55). The district court was anxious to get to a consideration of the generalized and spurious allegations of statutory defects because it could see that the plaintiffs, now appellants, were, by harassment and delay, attempting to block the use of legislation of the State of Michigan solely because these plaintiffs and appellants considered such legislation to be unwise. (J.S. 56)

The belief of the district court that the plaintiffs' and appellants' claims were vexatious and designed to harass and impede (J.S. 56) stemmed from the fact that the alleged defects in the Michigan drain legislation (which bore any relationship at all to sense and legal reality) have all been considered and passed on by the Michigan Supreme Court in a series of cases presented to it subsequent to the enactment of Chapter 20 of the Drain Code of 1956, as amended, or in cases prior thereto involving similar types of public improvements. (J.S. 54; 59-61) *Moore* v. *Harrison*, 224 Mich. 512; *Holland* v. *Clerk of Garden City*, 299 Mich. 465; *Oakland County Drain Comr.* v. *City of Royal Oak*, 306 Mich. 124; *In Re Fitch Drain No. 129*, 346 Mich. 639; *Connor* v. *Herrick*, 349 Mich. 201; *Black Marsh Drainage District* v. *Rowe*, 350 Mich. 470; *Twp. of Southfield* v. *Drainage Board for Twelve Towns Relief Drains*, 357 Mich. 59; *City of Madison Hts.* v. *Twelve Towns Relief Drains Drainage Board*, 361 Mich. 522 (cert. den. 366 U.S. 919); *International Salt Company* v. *Herrick*, 367 Mich. 160; *In Re Petition of Macomb County Drain Commissioner*, 369 Mich. 641.

In the last cited case, involving two of the defendant-appellee drainage districts in this appeal, Mr. Justice Black

had the following to say about Chapter 20 of the Drain Code of 1956, to-wit:

> "Proceedings under chapter 20 are special and summary. In the nature of their purpose such proceedings must so advance, provided due notice and opportunity to be heard are supplied, as they were here. Much in the way of quasi-legislative and quasi-judicial authority is vested by law[3] in the appointed drainage board with indicative corollary that, to the extent its doings are reviewable only within the limits of the constitutional writ of certiorari (see section 483), so must the legislatively provided quasi-judicial powers of the board be deemed enlarged.
>
> "Sections 467 through 469 of chapter 20 provide little light upon the hearing duties and functions of the drainage board. We are not advised of legislative intention that the board may or should administer oaths and hear the testimony of sworn witnesses. Our decisions, however, fill such crevices as are necessary for determination of the questions brought into circuit by the writ. We turn to them for adoptive analogies.
>
> "[1, 2] In another thoughtfully analyzed special assessment case this Court summed up its previous holdings in these words (*Cummings* v. *Garner*, 213 Mich. 408, 433, 182 N.W. 9, 17):
>
> > 'It is the province of the Legislature, directly or by delegation, to establish the special assessment district, determine the amount of the special assessment, and the rule of apportionment. Where the rule of apportionment is according to the special benefits derived, the application of that rule may

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[3] Chapter 20 was found constitutional, as against presented constitutional questions, in *Black Marsh Drainage Dist.* v. *Rowe*, 350 Mich. 470, 87 N.W. 2d 65.

> be effected by the employment of any method which will accomplish that purpose, whether it be by valuation, frontage, superficial area, or any other method which does not lose sight of the fundamental basis of special assessments for local improvements. The authorities abundantly support this conclusion. If the determination of the rule is within the recognized power of the Legislature, then, how that rule shall be applied is clearly within its authority.' "

The Supreme Court of Michigan has clearly decided that the delegation of legislative, administrative and judicial powers to the defendant drainage districts and their drainage boards is constitutional under the Constitution of Michigan and the due process of law and equal protection of the law clauses thereof. No further or different questions were presented to the district court under the Constitution of the United States. *Myles Salt Co.* v. *Iberia, etc. Drainage Dist.* 239 U.S. 478; *Valley Farms Co.* v. *Westchester County*, 261 U.S. 155; *Chesebro* v. *Los Angeles County Flood Control*, 306 U.S. 459.

The import of the foregoing comments is not only that the Michigan Court, in other cases, has decided the constitutional issues asserted by appellants. The true importance, and the great importance, of the foregoing comments is that when the correct construction of the provisions of Chapter 20 of the Drain Code of 1956 adopted by the Michigan Courts (which is binding on the Federal Courts, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *West Virginia Motor Truck Assn.* v. *Pub. Serv. Com.*, 123 F. Supp. 206, affd. 348 U.S. 881) is substituted for the spurious and false construction urged by the appellants, there are no Federal Constitutional questions left for decision. The

Federal Courts will not adopt a statutory construction opposed to that adopted by a State Court in order to create a Federal Constitutional question. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112; *Holliday* v. *Governor of South Carolina*, 78 F. Supp. 918, affd. 335 U.S. 803; *Barker* v. *Leggett*, (D.C. Mo. 3 Judges) 102 F. Supp. 642 app. dism. 342 U.S. 900; *Phillips Petroleum Co.* v. *Jones*, (D.C. Okla.) 147 F. Supp. 122. This is what these appellants were asking the district court to do.

The foregoing discussion and the opinion of the district court referred to therein and the other court decisions cited therein, demonstrate clearly that the questions presented by the appellants numbered 5 thru 12 (J.S. 4-6) are so unsubstantial as not to need further argument. These questions numbered 5 thru 12 are the only questions presented by appellants which were ruled on by the district court.

The questions numbered 1 thru 4 (J.S. 3 and 4) of the questions presented by the appellants were not considered or ruled on by the district court. As to Questions 1 and 2 (J.S. 3 and 4) it is clear from the record that the judgment entered by the district court (App. A22) is fully supported by the Opinion of the district court (J.S. 54) and vice versa. Remarks made by members of the district court during the course of hearing arguments and before entry of the judgment and rendering of the opinion (App. A23 and A27) must be held to be merged in these two documents which represent the final action of the district court. The appellants made no motion to alter or amend the judgment. (Rule 59(e)) It appears that the appellants are not aware that a Judgment Dismissing Complaint and Amended Complaint for failnre to state a claim upon which relief can be granted is a judgment on the merits of the claim or claims

asserted in such complaints. Since such a judgment is a decision on the merits, it is not only appropriate, but necessary, that any opinion rendered following entry of this judgment should consider the merits of the plaintiffs' and appellants' claims. (Question 1) Such a judgment and opinion on the merits in *res judicata* of the meritorious issues raised and decided by the filing and dismissal of the complaints (Question 2).

As to Questions 3 and 4, the appellants do not correctly apprehend that the filing, hearing and granting of a motion to dismiss for failure to state a claim upon which relief can be granted is "a trial of the case on its merits" (Question 3, J.S. 4). It is just as much a trial of the case on its merits as is a jury trial. Such a trial by motion to dismiss, which is granted, results in just as much of a judgment on the merits as does the verdict of a jury and the judgment based thereon. (App. A34)

The defendants, now appellees, made no motion for summary judgment but made a motion to dismiss. This motion to dismiss was made, as is required by Rule 12 of the Federal Rules of Civil Procedure, before the defendants filed answers to the Complaint. The filing and time for hearing a motion to dismiss are governed by the provisions of Rules 6(d) and 12(b) and not by the provisions of Rule 56 pertaining to summary judgments. Rule 12(b) refers to Rule 56 only as to disposition of a motion to dismiss, such as by a partial judgment or by a finding of no genuine issues of a material fact. The appellants claim that no discretion exists under Rule 56 as to the 10 day notice requirement. This may be true, but Rule 12(b) directs the district court to exercise its discretion in giving "reasonable opportunity to present all material".

At any rate, Question 4 presented by appellants (J.S. 4) is a moot question because there were no factual issues, genuine or not, presented by the Complaint and Amended Complaint and because the appellants offered no material and made no request for an opportunity to present material which was denied to them. Even under the provisions of Rule 56, the appellants would have had to present their material "prior to the day of hearing" which for a motion served on July 1, 1963, would mean July 9, 1963, and on this day the appellants were allowed to present any and all material they desired, including a 52 paragraph, 10 prayer, Amended Complaint, filed July 8, 1963, but presented to defendants and appellees on July 9, 1963, just prior to the hearing on the Motion to Dismiss. (App. A29)

Again it must be asserted that the Questions Presented by appellants, numbered 1 thru 4, as well as questions numbered 5 thru 12, are so unsubstantial as not to need further argument.

CONCLUSION

Attached to the complaint filed by plaintiffs and appellants on June 19, 1963, as an exhibit, was a copy of the Official Notice of Sale of Martin Sanitary Diversion Drain Bonds, as published in the newspapers in Macomb County, Michigan. (J.S. 39) This notice of sale called for the receipt of bids for the bonds on June 20, 1963, the next day. The district court knew that the mere filing of this action on June 19, 1963, attacking the validity of Chapter 20 of the Drain Code of 1956, as amended, had the same effect as a temporary injunction in preventing this bond sale scheduled for June 20, 1963, and in preventing the sale in Michigan of any other drain bonds authorized pursuant to said Chapter

20. Plaintiffs and appellants alleged that the drain projects underway in Macomb County alone had an aggregate estimated cost of fifty million dollars. (J.S. 21 & 38) The district court knew, as stated in its opinion, (J.S. 56) that the mere pendency of this action served to hold up the financing of all of these public health drain improvements, as well as other similar projects throughout the State of Michigan.

The pendency of this action on appeal still serves to block the financing of all so-called Chapter 20 drain projects in Michigan.

The fact that the basis of the attacks made on the validity of Chapter 20 had already been considered and rejected by the Michigan Courts, and the fact that such attacks were so general and so contrived as to be completely unsubstantial, convinced the district court, correctly, that as speedy and as complete a disposition of this action should be made as was consistent with justice. (App. A31) The same considerations apply in urging that this Motion to Affirm be granted, thus bringing an end to this vexatious litigation and removing the injunctive effect of its pendency.

The district court gave serious and extensive consideration to all allegations and all arguments advanced by the plaintiffs and appellants and reviewed and analyzed all authorities pertinent to all of the issues involved in this action, no matter how unsubstantial. The decision of the district court is correct and this appeal presents no question warranting plenary consideration by the Supreme Court of the United States. The judgment of the district court should be affirmed.

Counsel for all defendants in the district court, now appellees here, have authorized the statement that they

join in this Motion to Affirm on behalf of their respective clients.

Respectfully submitted,

John H. Yoe
Charles R. Moon

November, 1963.
Dickinson, Wright, McKean & Cudlip,
Of Counsel.

APPENDIX

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MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

The defendants, City of St. Clair Shores, Thomas S. Welsh, Macomb County Drain Commissioner, Bernard A. Kalahar, Chairman of the Macomb County Board of Supervisors, Frank Biehl, Chairman of the Finance Committee of the Macomb County Board of Supervisors, and each Drainage District, a body corporate, for the 12 drains named in the Complaint, hereby assert that the said Complaint fails to state a claim upon which relief can be granted and therefore move to dismiss said Complaint for the following reasons and grounds, to-wit:

A. There are no rights of the plaintiffs, as alleged, guaranteed to them by any provision of the Constitution of the United States or by the Constitution of the State of Michigan, as taxpayers in the City of St. Clair Shores or as citizens of the City of St. Clair Shores, to vote on the proposition as to whether or not the City of St. Clair Shores may approve, execute and file a petition pursuant to Sections 463, 482, 485 and 486 of the Drain Code of 1956, nor to vote on the proposition of the assessing against the City of St. Clair Shores by the defendant drainage boards of a portion of the cost of each drain project pursuant to Sections 473, 474, 475, 477 and 478 of said Drain Code.

B. There are no rights guaranteed to the plaintiffs, as alleged, as taxpayers in or citizens of the City of St. Clair Shores, guaranteed to them by the Constitution of the United States or by the Constitution of the State of Michigan to vote on the question of whether or not the tax limitations of the City of St. Clair Shores shall be

increased or otherwise changed by reason of the assessment against said city of portions of the cost of each drain project or by reason of the obligation of the city to levy a tax to raise money to pay said assessment, and the plaintiffs have not alleged nor is it the fact that the City of St. Clair Shores will tax in any amount or at any rate beyond or in excess of the 15 mill tax limitation and after January 1, 1964, under the new Constitution of the State of Michigan, there will be no tax limitation applicable to taxes levied to pay Chapter 20 bond obligations.

C. None of the defendant drainage districts and none of the drainage boards therefor and none of the defendants, other than the City and the County, have or claim any right to levy taxes against the property of any of the plaintiffs and, therefore, no question as to the violation of rights of the plaintiffs guaranteed by either the Constitution of the United States or the Constitution of the State of Michigan are violated by a taxing power which does not exist.

D. The legislature of the State of Michigan has the power to delegate to the City of St. Clair Shores and to the defendant drainage boards and drainage districts the legislative and judicial powers which are delegated to each of them pursuant to the Drain Code of 1956 and none of the delegations of such powers set forth in the Drain Code of 1956 violate any rights of the plaintiffs guaranteed to them by either the Constitution of the United States or the Constitution of the State of Michigan and the plaintiffs have alleged no such rights which are violated by any such delegations of powers set forth in the provisions of said Chapter 20 of the Drain Code of 1956.

E. The provisions of the Drain Code of 1956, set forth

in Sections 474, 475, 477 and 490, providing for the assessment of part of the cost of each of the 12 drain projects against the City of St. Clair Shores and requiring the city to levy a tax upon all of the real and personal property of the plaintiffs subject to ad valorem taxation and allowing the council of the city to cause part of said costs to be assessed according to benefits, if such special assessment method of financing is not inconsistent with city financing policy as to similar drains and sewers, or, in lieu of levying special assessments, permitting the city to exact connection charges for connection to each drain project, do not deprive the plaintiffs of property without due process of law and do not deny to the plaintiffs the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

F. The provisions of the Drain Code of 1956, set forth in Sections 467 and 469, providing for notice of the time and place when and where each drainage board will meet to hear any objections to the proposed drain and the petition therefor and to the matter of assessing the cost of such drain to the City of St. Clair Shores and providing for notice of the time and place when and where each drainage board will meet and hear any objections to the apportionments of cost of each drain against the City of St. Clair Shores, do not deprive the plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; and the absence of any requirement in the provisions of Chapter 20 of the Drain Code of 1956, for individual notice of said meetings to each of the plaintiffs, does not deprive the plaintiffs of property without due process of law; and the notice requirements set forth in the said Sections 467 and 469 are adequate and complete.

under applicable Federal and Michigan constitutional requirements of due process of law, for the establishment and levying of assessments against the City of St. Clair Shores, at large, and not against the individual properties of the plaintiffs; and the plaintiffs have not alleged that they did not receive actual notice of said meetings and that they did not attend said meetings.

G. The plaintiffs have neither alleged in what manner and to what extent there has been any injury or damage or jeopardy to their rights, as owners of property and taxpayers in the City of St. Clair Shores, arising out of the alleged arbitrary nature of proceedings pursuant to Chapter 20 of the Drain Code of 1956 or arising out of the alleged failure of the provisions of said Chapter 20 to contain safeguards, controls, guides or standards; nor have they alleged in what manner and to what extent the provisions of the said Chapter 20 and the actions of the defendants thereunder have violated any rights of the plaintiffs guaranteed by the Constitution of the United States or on what occasion and in what manner any decisions were made or actions taken by the defendants which caused such injury, damage, jeopardy or violation with respect to the property of the plaintiffs as taxpayers in the City of St. Clair Shores; nor have the plaintiffs alleged that any such actions or decisions of said defendants were wrong or were taken in spite of or against the protests or objections of the plaintiffs; nor have the plaintiffs alleged any facts or set forth any claims which overcome the presumption that the actions of the duly elected and appointed officials of the City of St. Clair Shores have been lawful and proper and in the best interests of the said city, of plaintiffs and of all other property owners, taxpayers and citizens in said

city in connection with the several Chapter 20 drain projects.

H. The plaintiffs have not alleged any valid grounds or standing for making a Complaint against the defendants, City of East Detroit, City of Roseville, the Honorable John C. Mackie, State Highway Commissioner of the State of Michigan, and the Michigan Municipal Finance Commission, and have not alleged any actions by any one or all or any combination of said defendants which have caused injury to or have damaged or jeopardized the interests or rights of the plaintiffs as property owners and taxpayers in the City of St. Clair Shores and the County of Macomb, and the full faith and credit of the State of Michigan is not pledged in payment of bonds issued or to be issued pursuant to Chapter 20 of the Drain Code of 1956, as amended.

I. The plaintiffs have neither alleged any actions by any defendants which have the effect of regulating or burdening interstate commerce in violation of Article 1, Section 8(3) of the Constitution of the United States nor have they alleged the manner in which the provisions of the Drain Code of 1956 and or the Municipal Finance Act regulate, attempt to regulate, or in any manner impose a tax or other burden upon interstate commerce in violation of said constitutional provision nor have they alleged any injury or damage or jeopardy to any rights of the plaintiffs in interstate commerce arising out of their alleged standing as property owners and taxpayers in the City of St. Clair Shores and the County of Macomb; and plaintiffs admit the drains are public health projects which brings them within the police power of the state and county and of each city.

J. The plaintiffs have not made any allegations which

show or tend to show that the Complaint should not be dismissed because of laches of the plaintiffs and because of their having waived, and now being estopped to assert, the right to contest the validity of the actions of the drainage board for each of the drains named as defendants herein and the actions of the City of St. Clair Shores and the County of Macomb relating to the creation and processing of said drain projects.

K. The plaintiffs have not alleged a want of authority on the part of the intra-county drainage boards to establish and construct the projects complained of, and in the absence thereof are relegated to assert their rights within the time provided by Section 483 of the Drain Code of 1956, as amended.

L. The plaintiffs claim a constitutional doctrine of separation of powers which is allegedly violated by the provisions of the Drain Code of 1956, as amended, through the delegation to the several defendant drainage boards of alleged legislative, administrative and judicial powers but do not allege how such delegations are a violation of the Constitution of the United States in light of the fact that the courts of the State of Michigan have found that the delegations of power contained in Chapter 20 of the Drain Code of 1956, as amended, are not violative of any provisions of the Constitution of the State of Michigan.

M. Plaintiffs allege a violation of the full faith and credit provisions of the Constitution of the United States as set forth in Section 1 of Article IV, but do not allege in what manner and to what extent any of the defendants have failed to give full faith and credit to the public acts of any state and in fact the plaintiffs appear to base their Complaint upon the fear that persons other than the

defendants will give full faith and credit to the public acts of the defendants in compliance with the said Constitution.

N. The plaintiff, Fair Drain Taxation, Inc., a Michigan nonprofit corporation, is not a taxpayer in any of the public corporations involved in the proceedings to establish any of the drains by the defendant drainage districts and has no standing or right to be a plaintiff in this Complaint on the basis of the allegations set forth therein.

This motion is based upon the files and records in this Court and cause and the affidavits and exhibits hereto attached and the statements, memoranda and other material submitted to this Court at the hearing held on June 25, 1963.

Dated: July 1, 1963

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(AFFIDAVITS AND EXHIBITS EXCLUDED WITH CONSENT OF DEFENDANTS' COUNSEL IN OPEN COURT AT TIME OF HEARING ON MOTION TO DISMISS ARE NOT REPRODUCED HERE.)

JUDGMENT DISMISSING COMPLAINT AND AMENDED COMPLAINT

At a session of said Court held in the Courtrooms in the Federal Building in the City of Detroit, Michigan, this 9th day of July, 1963.

Present, Honorable Clifford O'Sullivan,
Circuit Judge, United States Court of Appeals for the Sixth Circuit,
Honorable Theodore Levin,
Chief District Judge,
and
Honorable Thaddeus M. Machrowicz,
District Judge.

This matter having come on to be heard on a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, filed on behalf of defendants on July 1, 1963, and noticed for hearing on July 9, 1963, and the Plaintiffs having filed an Amended Complaint on July 8, 1963, which Amended Complaint and the Complaint filed in this civil action on June 19, 1963, have been examined and considered by this Court in the light of the said motion to dismiss and the briefs and arguments of counsel and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Amended Complaint filed in this civil action on July 8, 1963, presents no new issues of law not already set forth in the Complaint and alleges no new facts

which are material or relevant or which present a genuine issue as to a material fact.

IT IS HEREBY FURTHER ORDERED, ADJUDGED and DECREED that the said Complaint and Amended Complaint be and the same are dismissed for failure to state a claim upon which relief can be granted, with prejudice, and with no costs.

CLIFFORD O'SULLIVAN
Circuit Judge
THEODORE LEVIN
Chief District Judge
THADDEUS M. MACHROWICZ
District Judge

A TRUE COPY
JULIUS L. KABATSKY, Clerk
BY: ROSEMARY MILLER, Deputy Clerk
(Tr-3)

Detroit, Michigan
Tuesday, June 25, 1963

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(Recess.)

JUDGE O'SULLIVAN: The Court feels that at this time it should dispose of the matter that is before the Court today, namely, the application for a preliminary injunction.

As to that, the Court is of the mind, and it will be the Court's order that the application for injunction is denied.

I think it is not necessary that we extensively discuss the reasons therefor. It is rather clear to us that under Section 1341 of the Judicial Code we should not enjoin the collection of state taxes or interfere with the imposition of taxes, if there is a plain, speedy and adequate remedy within the

state courts. We are impressed that that is the situation here, and that alone would permit us and urge us to deny an injunction at this time, and so it is our order at this time that the application for injunction be and it is denied.

Now, further matters have been suggested to us relating to the dismissal of the complaint that is before us.

Mr. Jackson advised us that he did not come here today prepared to consider the matter of the motion to dismiss and was not prepared to argue it.

Frankly, we entertain grave doubts, apart from Section 1341, of the jurisdiction of this Court of the litigation that (Tr-4)
is presented by the complaint. We of course have the right, wholly without the filing of a motion to dismiss, to dismiss the cause at any time if the Court is without jurisdiction. We frankly have grave doubts as to whether this Court has any jurisdiction. And to be fair to counsel for both parties, we likewise, at this moment at least, and upon the basis of the complaint and the representations that have been made, are doubtful whether the complaint, as presented, states a cause of action for equitable relief. We think this litigation should be promptly disposed of. It involves matters of very important public concern to the welfare of the people of the various municipalities involved, and the litigation should be promptly disposed of.

If a motion to dismiss is made, this Court will hear it with as much dispatch as is possible, having in mind the rights of the litigants to be heard on it. It happens that the engagements of the members of the panel that are hearing this case are such that the earliest that a motion to dismiss could be heard, if one is made, would be probably on July 9th because one member of the panel has engagements that prevent him from being available for an earlier hearing.

But if that is to be the course of the case, we would want all motions and responses thereto to be made promptly with any memoranda of legal authorities so that the case could be noticed for hearing not before July 9th, at 1:30 in the afternoon, which would make it possible for this panel to

(Tr-5)

meet here and consider it.

So that as far as the hearing today is concerned, we will deny the motion for a temporary injunction. It is denied, and an order confirming that ruling of the Court may be presented for signature and we will await further action on the matters I have discussed, as to the dismissal of the complaint on various grounds, if that matter comes before us.

That will be the disposition today.

Is there anything that any counsel wishes to state to the Court, either for the plaintiffs or for the defendants?

MR. MOON: If your Honor please, we will file a motion to dismiss for that day, if we may consider that as the available time, July 9th, at 1:30.

JUDGE O'SULLIVAN: I think whatever you do must be done in sufficient time so that the plaintiff will have full time and opportunity to make whatever response to any motion he may wish, and any briefs that are filed with memoranda should be in the Court's hands at least forty-eight hours before that time.

So I think you all understand our time schedule and will accommodate yourselves to it.

MR. MOON: Will the Court consider this as continued, or does the Court want again urged the jurisdictional question under Section 1341, and the amount in controversy?

JUDGE O'SULLIVAN: Well, let me say this: that in

(Tr-6)

some instances the courts have, relying on Section 1341, denied the injunction, retaining jurisdiction.

It may be that the cause may be dismissed without prejudice, unless the Court is satisfied that there is no jurisdiction or that the Bill itself contains no equities. Those are matters even distinct from Section 1341.

MR. MOON: Then as I understand the Court, this Court has held that even a declaratory judgment would not be granted when blocked by Section 1341, so that the injunction itself is not the sole problem, as far as Section 1341 is concerned.

JUDGE O'SULLIVAN: We realize that in this instance the whole direction and thrust of the complaint is for injunctive relief against the imposition of taxes, so that that is what is involved. But Section 1341, in some views, has been employed to deny an injunction at the moment, but holding jurisdiction to see whether or not the persons who have come to us are accorded a proper remedy in the state court, and if it is denied there the case is still before the Court.

What I am trying to say is that there may be other grounds that could be considered in this case which have been discussel here today. But, as Mr. Jackson said, he did not come here today to discuss those questions, and we don't think there should be a premature ruling on those things when counsel has said he did not come here to discuss it and was not prepared to discuss it.

(Tr-7)

Very well, gentlemen.

MR. JACKSON: Thank you very much, your Honor.

We will have the right to amend our pleadings if we so elect; is that correct, your Honor?

JUDGE O'SULLIVAN: I cannot rule on anything

ahead of time that is not before us in that regard.

MR. JACKSON: Thank you very much.

MR. MOON: Thank you.

(End of hearing.)

(Tr-8)

COURT REPORTER'S CERTIFICATE

I, Carl J. Pitt, do hereby certify that I, by means of a stenomask, reported the foregoing proceedings in Civil Action No. 24000, entitled FAIR DRAIN TAXATION, INC., et al, v. CITY OF ST. CLAIR SHORES, et al, before the Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thaddeus M. Machrowicz, District Judge, sitting en banc, at Detroit, Michigan, on June 25, 1963; that the foregoing and attached seven (7) typewritten pages are a true and correct transcript of that portion of my records then and there made of said proceedings.

Carl J. Pitt
Official U. S. Court Reporter
739 Federal Building
Detroit 26, Michigan
WOodward 1-9177

Dated: June 26, 1963.

(Tr-3)

Detroit, Michigan,
Tuesday, July 9th, 1963

* * *

(Recess.)

JUDGE O'SULLIVAN: I think I should say for the panel of this Court that is hearing this that we have a procedural question here that has given us some concern, but

we think we have arrived at the right way in which to handle it, and I think it important that we make a record of the background of the case insofar as it affects this procedural question.

This matter first came on for hearing upon the Plaintiffs' application for a temporary injunction and it is my recollection that that hearing was held on June 25th. A full hearing was had on the question of injunction. But, necessarily, in the discussion of the question of injunction the merits of the case were discussed at length. At that time the Court seriously questioned whether we had any jurisdiction, from the standpoint of the amount involved and for other reasons then discussed.

We considered at that time the possibility that the case might be dismissed on the Court's own motion and that necessarily would have disposed of the question of the temporary injunction.

Also, those things involving the merits of the case were discussed at considerable length by both the plaintiffs (Tr-4)
counsel as well as the counsel for the defendants. It was our thought at that time that we might consider the question of the sufficiency of the complaint from several standpoints—not only jurisdiction, but the merits of the case.

However, plaintiffs' counsel asked the Court not to get into that subject at that time because they had come here prepared only to discuss the question of injunction and were not prepared to argue the merits of the complaint and the question of whether it was subject to dismissal.

Because of that request of plaintiffs' counsel, the Court decided to defer consideration of it and at that time set July 9th as the date when we would hear a motion to dismiss. It was in the contemplation of everyone at that time

that a formal motion to dismiss would be promptly presented and served. That was done, and a notice for the date which we have set, namely, this date, July 9th, at 1:30 o'clock.

In the interim, plaintiffs' counsel spoke to one of the members of the Court as to an extension of time or an adjournment of this motion so that they might give further consideration to the motion to dismiss.

With that in mind, it just happened that I was here in Detroit and Judge Levin was here and we met with counsel for the plaintiffs and one of the counsel for the defendants, the counsel who has carried the principal burden of the presentation to the Court. We had an informal discussion in chambers, at the conclusion of which we advised plain-
(Tr-5)
tiffs' counsel that this was a matter of such exigency and emergency that we thought the matter should go forward today.

Within the last twenty-four or forty-eight hours the plaintiffs presented an amended complaint.

Frankly, it was this panel's impression that we should allow the amended complaint and we assumed at that time that it would be considered as a pleading involved in the matters we were going to discuss today, and we did allow the amended complaint to be filed without a motion therefor or without notice to the defendants, and then the Court announced it was the Court's intention that the motion to dismiss which has been filed would be considered as applying to the amended complaint as well as to the original complaint. And, actually, I assumed that upon the allowance of the amended complaint, and the filing of it, the original complaint no longer was a pleading in this case. However, plaintiffs' counsel objected to proceeding at this

time either on the original complaint or amended complaint, bottomed upon their contention that the motion made was equivalent to a motion for summary judgment, and therefore sufficient time had not been given of the presentation of the motion; secondly, that no notice had been given of a motion to dismiss the amended complaint.

The motion to dismiss the amended complaint was made in open court at the beginning of this hearing. (Tr-6)

This Court made inquiry of plaintiff's counsel, as well as making its own examination of the amended complaint, and both by the response made to the Court's questions and by the Court's own examination it appears to us that the amended complaint presents nothing of substance that was not presented by the original complaint. The thrust of both complaints is the unconstitutionality of certain Michigan statutes and their unconstitutional use by certain public officers.

In view of that background, it was the order of the Court that we would hear the motion to dismiss the amended complaint forthwith as a part of the hearing today, and that remains, of course, our order. We are satisfied that no inequity has been visited upon plaintiff's counsel by our so proceeding, because all of these matters have been discussed in the briefs that have been filed, covering all of that. So, procedurally, we are hearing the motion to dismiss the amended complaint.

This is a matter of very great importance to the plaintiffs as well as to the defendants, and we have tried to give earnest consideration to the positions of all of the parties that are here before us today.

Firstly, we wish that we could have more time for our contemplative consideration of the legal points involved,

but we think, this being a matter of great public concern, —in fact it involves the health of the persons who will be (Tr-7)
affected by what we do, and therefore we cannot give ourselves that opportunity to more quietly and leisurely consider the legal questions. It is a matter of such emergency nature that prompt decision of it should be made. The affairs of several municipalities of Macomb County, Michigan are involved, as well as the people of those municipal bodies, the municipal divisions. And the public health within the areas referred to may be impaired unless the projects now under attack are permitted to go forward without further delay.

We think, therefore, without awaiting the writing of a formal opinion or memorandum that we should announce at this time our disposition of the case before us.

We will, upon a presentation to us of an order to that effect, dismiss the original as well as the amended complaint, both on our own motion and upon the motion to dismiss that has been filed by the defendants.

We will further expose our views in a memorandum that may be filed as quickly as it can be done, but we do at this time announce our holding substantially as follows:

We find that both the original and the amended complaints before us do not, either of them, state a cause of action, within the jurisdiction of this Court, nor do they state a cause of action.

Assuming the truth of whatever factual allegations are contained in the original and the amended complaint, we (Tr-8)
find that they do not disclose that any Federally granted constitutional rights of the plaintiffs have been invaded, nor do we find that the Michigan statutes described in and

attacked by the complaint and amended complaint, in their operation as described in those pleadings, invade or impair any of the plaintiffs' Federally granted constitutional rights.

Inasmuch as the matter is before us, we likewise are of the opinion and find that the Michigan statutes mentioned and under attack in the pleadings before us, we find that neither as adopted by the Michigan legislature, nor as they have been employed, as described in the pleadings before us, offend any constitutional rights granted to these plaintiffs by the Constitution of the State of Michigan.

Now on the question of this Court's abstention from entering into a case which in our opinion, if it had merit to it, could have been presented and could be presented to the State courts of Michigan.

We feel that the ultimate objective of the complaint and amended complaint is to restrain the assessment, levy or collection of taxes under the laws of Michigan.

Section 1341 of Title 28, United States Code, forbids a United States District Court from granting any such restraint under the circumstances here, because we are of the opinion that if there were any merit to the plaintiffs' position, these plaintiffs have a plain, speedy and efficient (Tr-9)
remedy available in the courts of Michigan, to vindicate the same rights they claim are involved in the case they had started in this Court.

Our dismissal of the amended complaint necessarily disposes of the application for injunctive relief, as any injunction, had it been granted as a preliminary injunction, would fall with the dismissal of the amended and original complaint.

Repeating that we regret we cannot spend more time con-

sidering this. We very much appreciate the presentation that has been made to us by plaintiffs' counsel, representing their clients, which is an important matter to them; it is likewise of great public importance to the people who make up the municipal areas involved. And so we feel we should dispose of the case by a formal order very promptly and we will supplement that formal order with as much promptness as we can possibly employ by a memorandum opinion more extensively exposing the reasons why we do as we do.

But it will be the order of this Court that the case will be dismissed and the defendants' counsel may present for signature to this Court an order dismissing the amended complaint which, having been allowed, takes the place of the original complaint; and, because of the exigencies involved, we say that that order should be presented to Judge Machrowicz of this court on Thursday of this week at (Tr-10)
eleven o'clock in the forenoon, but that the copy of it be delivered to the plaintiffs' counsel not later than two o'clock tomorrow afternoon.

We certainly are moving very rapidly, gentlemen, but we feel that the public interest requires this dispatch.

MR. MOON: May it please the Court, I have prepared an order, because of the exigencies as noted by the Court, in the hope that a simple order dismissing the complaint and amended complaint could be entered, which I have here.

I have a hearing at ten o'clock in Oakland County before Judge Arthur E. Moore on Thursday, which has been set for some little time now, and I have to attend.

JUDGE O'SULLIVAN: Has the plaintiff seen the proposed order?

MR. MOON: No, sir. I will be glad to present it to him.

JUDGE O'SULLIVAN: If you will present him with the proposed order.

(Intermission while Court and counsel study the proposed order.)

JUDGE O'SULLIVAN: Would counsel for the plaintiffs care to address the Court on the form of this order?

MR. SANDERS: The form looks like a nice form. The objection would be as to the contents, as to one part, and that would be in the last paragraph thereof.

(Tr-11)

I do not remember hearing the Court saying that this would be "dismissed with prejudice and with costs."

JUDGE O'SULLIVAN: We didn't specifically cover that, but I said that I think that all of the members of the panel have already noticed the question of costs, and it would be our disposition to strike that from it. This is a public question, and at least I think we would exercise our discretion to eliminate that. I think the question "with prejudice," however, should remain, because we have indicated we are dismissing it on the merits.

MR. SANDERS: If that is the decision of the Court, then we will abide by the decision of the Court.

JUDGE O'SULLIVAN: And this disposition of the Court obviates any further procedure we have talked of.

So this order as presented, striking out the last phrase "and with costs to all defendants" shall be eliminated; otherwise, it shall be signed, if presented.

Judge Levin calls my attention to the fact that a dismissal might carry costs. So we will make that clear and substitute the words "with no costs."

MR. MOON: I will say, with all honesty, that under your rules, if you say nothing about costs, we then are not entitled to them.

I wanted to specifically bring them to the Court's attention.

(Tr-12)

MR. SANDERS: Might I approach the bench?

JUDGE O'SULLIVAN: Yes.

MR. SANDERS: We realize that the Court has taken the matters herein presented under full consideration and the Court has entered an order now, but we do intend to appeal this decision and we were wondering how soon we could have the Court's memorandum in support of its decision?

JUDGE O'SULLIVAN: It probably will be in your hands this week.

MR. SANDERS: Thank you, your Honor.

JUDGE O'SULLIVAN: The Court will stand adjourned.

(End of hearing.)

(Tr-13)

COURT REPORTER'S CERTIFICATE

I, Carl J. Pitt, do hereby certify that I, by means of a stenomask, reported the foregoing proceedings in Civil Action No. 24000, entitled FAIR DRAIN TAXATION, INC., et al v. CITY OF ST. CLAIR SHORES, et al, before the Honorable Clifford O'Sullivan, Circuit Judge, Honorable Theodore Levin, Chief District Judge, and Honorable Thaddeus M. Machrowicz, District Judge, sitting en banc, at Detroit, Michigan, on July 9, 1963; that the foregoing and attached twelve (12) typewritten pages are a true and correct transcript of that portion of my records then and there made of said proceedings.

Carl J. Pitt
Official U.S. Court Reporter
739 Federal Building
Detroit 26, Michigan
WOodward 1-9177

Dated: July 30, 1963.